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## CHAPTER SEVEN

## THE PRIVACY AND FREEDOM OF INFORMATION ACTS

## 0700 References

a. SECNAVINST 5720.42E, "Department of the Navy Freedom of Information Act Program".

b. SECNAVINST 5211.5C, "Personal Privacy and Rights of Individuals Regarding Records Pertaining to Themselves".

c. JAGINST 5800.7C, "Manual of the Judge Advocate General"

## 0701 BACKGROUND

a. General

(1) The Freedom of Information Act (FOIA) allows any person, whether a U.S. or foreign citizen, to seek access to agency records concerning the operations, activities, and functions of the Executive Branch of Government. Reference (a) is the Navy's implementing instruction.

(a) Upon a request by a member of the public who follows the rules established by proper authority, a Navy record should be released unless it is exempt from mandatory public disclosure under the FOIA. There are nine reasons or "exemptions" under FOIA to withhold information from disclosure.

(b) If a requested record is exempt under the FOIA, it may nevertheless be released in the discretion of the release official. A discretionary release to one requester, however, may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else.

(c) In employing FOIA exemptions, the identity or purpose of the FOIA requester is irrelevant with the sole exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.

(d) In order that the public may have timely information concerning naval activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Reference (b) is the Navy's implementing instruction.

(2) The Privacy Act (PA) permits the collection, storage, disclosure, accounting, and amendment of personal information required by an agency. Within the Navy, there are approximately 200 PA systems of records into which personal information lawfully may be collected. U.S. citizens or legally admitted aliens can use the PA to seek records specifically retrievable by their own name or other personal identifier. All other requests for personal information by third parties must be processed under the FOIA.

(3) It is important to recognize the distinctions between the PA and FOIA

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with regard to personal information.

(a) Requests under the PA typically involve an individual seeking personal information about themselves. Although a person may seek personal information about themselves by initially filing a FOIA request, such requests are appropriately processed under the PA and FOIA, giving the benefits of both acts to the requester under the PA.

(b) Members of the public may request information, not necessarily about themselves, that may contain significant personal information about others. There are two FOIA exemptions that could permit withholding such personal information--exemptions (b)(6) and (b)(7)(C). Exemption (b) (6) permits withholding personal information that, if released, would result in the clearly unwarranted invasion of personal privacy of an individual. FOIA exemption (b)(7)(C) permits the withholding of personal information in investigatory records, the disclosure of which could result in an unwarranted invasion of personal privacy.

(4) A violation of the PA involves the improper collection, disclosure to one other than the subject of the records, or accounting of information maintained in a PA system of records.

(5) The following examples reflect the significant influence of both the FOIA and the PA on the responsibilities of public affairs officials:

(a) News reports from a single television station accuse two local recruiters of falsifying test documents to enable poorly qualified applicants to "qualify" for enlistment. The reports are "exclusives" based on information volunteered to the station by an informant who complained that reports to his commanding officer resulted in no action. The command's investigation of the recruiters, initiated when the "informant" first alleged wrongdoing, led to proceedings against the recruiters. The station obtains a copy of the investigation under the provisions of the FOIA. To discredit the "no action" allegation, the command PAO provides the station the courts-martial results and statistics which indicate the incident is isolated. The PAO learns that the informant has a history of inappropriate behavior documented in several enlisted performance evaluations and received nonjudicial punishment for making false official statements on two occasions. Based on information supplied by the informant, the station launches a new series of reports titled "recruiter malpractice." The command can discredit the informant only by information which bears on the case at hand. Releasing information on the individual's past performance evaluations or nonjudicial punishment would violate the privacy of the individual concerned. Such information must be withheld under FOIA exemption (b) (6). Additionally, inappropriate release of personal information from a Privacy Act system of records would be in violation of the PA and could result in a fine of up to \$5,000 and personnel action.

(b) Under the provisions of the FOIA, an individual obtains a document that consists of an assessment of the risk posed by continued operation of a small, civil airstrip in the vicinity of an ammunition storage facility proposed for a nearby Marine Corps Air Station (MCAS). The requester makes the document available to reporters from

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numerous news media, but neither the requester nor the news media places the risk analysis data in perspective. Resultant news reports emphasize the possibility of an accident rather than the probability which, according to the analysis, "is extremely remote." While the FOIA compels an agency to release documents (unless specifically exempted), it is often advantageous for a command to release a document publicly in advance of FOIA requests. That enables the command to furnish additional information to the media which explains technical data and places the document in perspective. Waiting until a potentially sensitive document has made an emotional impact complicates the public information effort.

**b. Assignment of Duties.** Because exchanges with the public on matters which relate to Privacy and Freedom of Information Acts often require parallel and simultaneous public affairs actions, the FOIA or Privacy Act coordinator responsibilities should normally be assigned to non-public affairs personnel, unless the size of the command, manning, or other circumstances leave no alternative.

**c. Additional Guidance, Definitions and Exemptions.** Reference (c), to be promulgated in the summer of 1990, contains updated information previously addressed in Chapter Seven of this instruction. In the interim, refer to references (a) and (b).



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**0703 FOIA REQUEST PROCESSING**

**a. Incomplete or Unclear FOIA Requests.** If the request fails to meet the minimum requirements listed in Article 0702d above, the requestor must be informed of what is required to make a complete request (such as a better description of the record desired). If the requestor did not indicate a willingness to pay a fee, a reasonable estimate of any search and reproduction costs must be provided.

**b. Time Limit for Response.** Upon receipt of a request for information under the Act, the request must be stamped with the date of receipt, be conspicuously labeled ("FREEDOM OF INFORMATION ACT REQUEST") and receive priority handling. The agency must respond to the request in 10 working days. Formal extensions of time of up to an additional 10 working days may be granted when:

(1) Records must be searched or collected that are located in places separate from the office processing the request;

(2) A substantial number of records must be collected and examined to respond properly;

(3) Consultation is required with another naval activity or agency that has substantial subject-matter interest in the determination of the request.

The requestor must be advised within the initial 10 working days that a time extension is necessary, the reason for the time extension and the date when the record will be provided. Reference (a) contains instructions for unusual cases in which requests cannot be met within normal statutory time limits (including allowable extension).

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**0704 INFORMATION EXEMPT FROM RELEASE UNDER FOIA**

**a. Information "For Official Use Only" (FOUO).** The protective marking "For Official Use Only" is applied to unclassified documents which can be exempted from public disclosure for reasons discussed in subparagraph b below per reference (a). It is not a marking designed to protect national security information. Records that do not bear the marking shall not be assumed to be releasable; a thorough examination of the contents is necessary to determine whether it is exempt from public disclosure. Likewise, records which bear the "FOUO" marking must still be examined to ensure that the material is still exempt in its entirety or whether all or a part of the record can be released.

**b. FOIA Exemptions.** Records are usually releasable under FOIA unless they fall under one of nine exemptions.

(1) **Exemption 1: Classified Material.** The material requested is properly and currently classified as specifically authorized under criteria established by Executive Order.

(2) **Exemption 2: Internal Matters.** The material contains or constitutes rules, regulations, manuals, directives or instructions related to internal personnel rules or practices of the agency and does not impose any requirement directly on the public and its release would substantially hinder the performance of a significant function of the agency.

(3) **Exemption 3: Limited by Statute.** The material requested cannot be released, because it is specifically exempted from disclosure by statute.

(4) **Exemption 4: Trade Secrets.** The material requested cannot be released, because it contains trade secrets, commercial or financial information obtained from a source outside the government that is being used by the agency contingent on the agency's protection of the information. Material contains trade secrets, commercial or financial information if its release would:

(a) Impair the government's ability to obtain necessary information in the future, or

(b) Substantially harm the competitive position of the individual who provided the information to the Department of the Navy.

(5) **Exemption 5: Deliberative Memoranda.** The material requested cannot be provided, because it is internal advice, recommendations or subjective evaluations as contrasted with factual matters. This exemption applies to records that may have flowed within an organization or among various Defense Department components. Examples of this exemption are: the nonfactual portions of staff reports which contain recommendations or opinions, information of a speculative nature, records that qualify for the attorney-client privilege and those portions of official reports of inspection, audits, investigations or surveys which pertain to safety, security or the internal management, administration or operations of the Department of the Defense and its components.

(6) **Exemption 6: Privacy.** The material requested cannot be provided, because personal information in medical, personnel and other files would, if disclosed, constitute a clearly unwarranted invasion of personal privacy. Numerous

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factors must be weighed in employing this exemption, such as the nature of the information under consideration for disclosure, the extent to which the public interest would be served in disclosing it, the newsworthiness of the individual to whom the information pertains, the passage of time since the event or situation discussed in the requested record, etc. Examples of information normally withheld from disclosure are home addresses and telephone numbers, social security numbers and information about an individual which is considered derogatory.

**(7) Exemption 7: Law Enforcement.** The material requested cannot be provided, because it consists of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

1. Could reasonably be expected to interfere with law enforcement proceedings;
2. Would deprive a person of a right to a fair trial or impartial adjudication;
3. Could reasonably be expected to constitute an unwarranted invasion of the personal privacy;
4. Could reasonably be expected to reveal the identity of a confidential source, including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;
5. Would reveal techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
6. Could reasonably be expected to endanger the life or physical safety of any individual.

**(8) Exemption 8: Regulation and Supervision of Financial Institutions.** The material cannot be provided, because it contains information related to the examination, operation or condition of financial institutions.

**(9) Exemption 9: Wells.** The material cannot be provided, because it reveals geographical and geophysical data concerning wells.



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## SECTION B

### PRIVACY ACT

#### 0705 HISTORY AND PURPOSES

a. **History.** Enacted in 1974, the Privacy Act is aimed at protecting individual privacy from unwarranted invasion by the government. Both FOIA and the Privacy Act are essentially complementary. Prior to the Privacy Act, FOIA Exemption Six was used paradoxically as justification to withhold information from the person on whom records were kept. As some judgements of the day put it, "The release would be an unwarranted invasion of the individual's own privacy." With the Privacy Act, individuals now have the right, with limited exceptions, to review records that pertain to themselves, thus preventing excessive disclosure of personal information to government agencies which do not have a need to know.

b. **Purpose of the Act.** Applicable to all federal agencies, the law protects all U. S. citizens and resident aliens and gives them a greater voice in the manner in which records about them are managed and eliminates or restricts intrusions on personal privacy by agencies of the federal government. Features of the Act are discussed below.

(1) The government is prohibited from keeping personal record systems which are secret or unreported. The law requires all agencies to publish annually in the Federal Register a list and description of record systems containing personal data.

(2) Federal personal information files are limited to those which are clearly necessary. Agencies may collect only such personal information which is relevant and necessary to carry out a purpose required by statute or executive order.

(3) Personal information collected for one purpose cannot be used for another purpose without the consent of the individual on whom information is maintained. When collecting personal information, agencies must provide the four-point Privacy Act statement to the individual.

(4) Agencies must also determine and publish notices regarding the "routine" uses of collected, personal information. They must obtain written consent from the individual to use personal information for any other unstated purpose or to transfer such information to another agency where "need to know" has not been previously and officially established.

(5) Agencies must also keep disclosure accountings, make them available to individuals and demonstrate to them upon request what non-routine disclosures have been made of such records to other agencies.

(6) Individuals have the opportunity under law to see what information about them is being kept and to challenge its accuracy. Usually, agencies must grant individuals access to records or documents about themselves. Individuals must also be allowed to review their records, make copies and submit information to correct or dispute those considered inaccurate. The only exception to this process is psychiatric records.

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**(7) Agencies may charge a set fee for record duplication.**

**(8) Agencies must publish in the Federal Register procedures for complying with the Act, including fees, means for granting record access and making amendments.**

**(9) Agencies must establish appropriate administrative, technical and physical safeguards for records and documents and must also establish rules of conduct and training for employees about their rights and responsibilities under the Act.**

**(10) Limits the use of social security numbers.**

**(11) Provides judicial remedies for violations of the Privacy Act.**

**(12) The Office of Management and Budget (OMB) oversees and administers the Privacy Act.**

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**0706 PRIVACY ACT EXEMPTIONS**

a. **Details.** The Privacy Act does allow any person or another agency to gain access to personal data without the consent of the individual when an exemption applies. These exemptions are:

(1) When a transfer of personal information is made within an agency (for purposes of this instruction, the Department of Defense is "an agency") and the receiving office has a bona fide need to know.

(2) When required under FOIA.

(3) When the record or document is used as part of the published "routine uses."

(4) When requisite information is furnished to the Census Bureau.

(5) For bona fide statistical use in a form in which subjects cannot be identified.

(6) To the National Archives as a historical document.

(7) With the written request of an agency head, to a law enforcement agency and for law enforcement purposes.

(8) In an emergency when personal health or safety is threatened.

(9) To either House of Congress or, to the extent of matters within its jurisdiction, any congressional committee.

(10) To the Comptroller General.

(11) By order of a court from a court of competent jurisdiction (signed by a state or federal court judge).

(12) To a consumer reporting agency.

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## SECTION C

### THE BALANCING TEST

#### 0707 BALANCING OF INTERESTS

a. **General.** According to the Privacy Act, "records" will not be disclosed without the written consent of the person to whom the records refer unless disclosure of the records comes within an exemption, including disclosure required by FOIA. FOIA requires--with certain exceptions--that properly requested records be made available to anyone. One of the exemptions is for "personnel and medical files and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The legislative history of FOIA notes that the act "enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary scrutiny, and the preservation of the public's right to governmental information." The Supreme Court has also commented on the balancing test, noting that the "Congress sought to construct an exemption that would require a balancing of the individual's right to privacy against the preservation of the basic purpose of FOIA, 'to open agency action to the light of public scrutiny.'"

b. **Basic Considerations.** Answers to these questions should be considered in applying the balancing test:

(1) What is the extent and value of the public interest or the objective of the individuals seeking the information?

(2) Would disclosure result in an invasion of privacy? If so, how serious is the invasion?

(3) Is the information available from other sources?

(4) What are the motives of the individual requesting the information?

c. **Media Relations Implications.** Unless news media representatives make it clear that they are seeking information under FOIA, their requests fall under the customary provisions of Chapter Three (Public Information). The policy of the Department of the Navy is that any information which would be released under FOIA should also be released to news media representatives upon request, whether or not they cite FOIA as the basis for their request. Application of the balancing test may require different answers to the same question during different time frames as media and public interest intensify. When there is high media and public interest, disclosure of information is not usually withheld because it is an invasion of personal privacy. Also, case law suggests that privacy interests are greatly diminished for persons who violate the law.

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**0708 BALANCING TEST CRITERIA**

**a. Basic Procedures.** All of the following criteria will be considered in determining whether or not information is releasable under the Privacy Act. This constitutes the balancing test.

**(1) REASONS TO RELEASE:**

- (a) Has an inquiry been received?
- (b) Is there a need to open the action to the light of public scrutiny?
- (c) Is the information available from other sources?
- (d) Is there a **real** public interest in releasing the information?
- (e) Would it otherwise be released if a FOIA request were filed?
- (f) Has the concern of individual privacy been diminished by a violation of law?
- (g) Is it being withheld merely because it causes embarrassment or reflects administrative inefficiency?
- (h) Would the release of the information meet a legitimate public need to be informed about a public figure?

**(2) REASONS TO PROHIBIT RELEASE:**

- (a) Does the information fall within one of the nine specific FOIA exemptions?
- (b) Will a legitimate government purpose be served by withholding the information?
- (c) Is it a clearly unwarranted invasion of personal privacy?
- (d) Would the government be subject to libel?
- (e) Is the information provided as an unrequested part of the response to a requested inquiry? (That is, is it more than was asked for?)
- (f) Could the information be misused against an individual (could it harm or embarrass?)
- (g) Is it entirely sensitive or derogatory, as it pertains to the individual?

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**0709 RELEASABLE PERSONAL INFORMATION**

**a. Details.** Certain personal information is considered releasable under the FOIA and would not be considered a clearly unwarranted invasion of personal privacy. Enclosure (3) of reference (a) directs the reader to examine paragraph 7b(2) of reference (b) for examples (not an inclusive list) of what can be routinely disclosed without constituting a clearly unwarranted invasion of personal privacy.

**(1) For civilian employees:**

- (a) Name;
- (b) Present and past grades;
- (c) Present and past position titles;
- (d) Present and past salaries;
- (e) Present and past duty stations;
- (f) Office or duty telephone numbers.

**(2) For military personnel:**

- (a) Name;\*
- (b) Rank and date of rank;
- (c) Gross salary;
- (d) Present\* and past duty stations;
- (e) Future assignments that are officially established;
- (f) Office or duty telephone numbers;
- (g) Source of commission;
- (h) Promotional sequence number;
- (i) Awards and decorations;
- (j) Attendance at professional military schools (major area of study, school, year of education and degree);
- (k) Duty status at any given time (i.e., active, selected reserve, USMCR, etc.).

\* Certain restrictions may apply to certain personal information the release of which might endanger personnel. Review Article 0507 (Release of Information that Could Endanger Personnel).

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**0710 MISCELLANEOUS APPLICATIONS OF THE PRIVACY AND  
FREEDOM OF INFORMATION ACTS**

**a. Privacy Rights and Deceased Persons.** Both the Privacy Act and its legislative history are silent on whether a decedent is considered an individual protected under the Act and whether anyone else may exercise the decedent's rights concerning applicable records. There are two implications. First, the Act does not provide a basis for surviving relatives or other interested parties to exercise Privacy Act rights after the death of a member. Second, the death of the member marks the end of Privacy Act protection which permits disclosure when required by the FOIA. The FOIA, however, does embody privacy-protecting features. Therefore, public interest in disclosure must still be balanced against the degree of invasion of personal privacy in each particular case. Accordingly,

(1) A command need not automatically, in all cases, disclose inherently personal information as soon as an individual dies, especially when public interest in the information is minimal.

(2) A decedent's records may contain information pertaining to other living individuals, and their right to privacy remains in effect. If such records are requested or information therein becomes the subject of inquiry, the personal privacy of the decedent's relatives or anyone else to whom the records pertain should be weighed in the balancing test [see Article 0708 (Balancing Test Criteria)].

**b. The Privacy Act and Minors.** No restriction is imposed by the Privacy Act based on age. It applies with equal force to both minors and adults. Parents may exercise a minor's Privacy Act rights, but must do so on behalf of the minor and not merely for the parents' benefit. Individuals are considered adults at the age of 18 unless the individual, at an earlier age, marries, enlists in the military or is otherwise pronounced an adult by a court order.

**c. Disclosure of Information in Service Records.** The criteria for disclosing to third parties personal information found in service or military personnel records is found in Exemption Six of the FOIA [see Article 0704b (FOIA Exemptions)]. In applying this exemption, a releasing authority must weigh public interest in disclosure against the invasion of personal privacy that will result from disclosure. Some tangible public interest must be furthered to justify an incursion on personal privacy. If a requester's interest can be served adequately by obtaining information not linked to a specific person, an Initial Denial Authority may provide such information after deleting personal identifiers.

**d. Disclosure of Photographs in DoD Custody.** Photographs of members of the armed forces and DoD civilian employees taken for official purposes usually may be disclosed when requested under the FOIA or Privacy Act unless the photo depicts matters that, if disclosed to public view, would constitute a clearly unwarranted invasion of personal privacy. Award ceremony, service record, chain of command and similar photos may be disclosed. Because the taking of such photographs is not a collection of information as defined by the Privacy Act, a Privacy Act advisory statement is not required.

**e. Disclosure of Security Clearance Level.** If information concerning an individual's security clearance is itself classified, it is protected from disclosure under the FOIA. If the information is unclassified, the individual concerned will

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have access under the Privacy Act, but the balancing test must be applied before it is disclosed to a third party (e.g., a news media representative) under the FOIA.

**f. Personal Notes as Records Governed by the Privacy Act.** Personal notes of unit leaders and office supervisors concerning subordinates are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as "a group of any records under the control of any agency...from which information is retrieved by the [individual's unique personal identifier]..." One reason for limiting the definition to records under the control of any agency was to distinguish agency records from personal notes maintained by employees and officials of the agency. Personal notes that are merely the extension of an author's memory will not come under the provisions of the Privacy or Freedom of Information Acts.

**g. Medical Record Access Which May Adversely Affect Inquirers.** An individual must be given access to his or her medical and psychological records unless, in the judgment of a professional qualified to make medical or psychiatric determinations, access to such records could have an adverse effect on the mental or physical health of the individual. When such a determination is made, the inquirer should be so informed, and the information transmitted to a physician named by the individual. The physician, however, should not be required to request the record on behalf of the individual concerned.